Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
	)	
T-Mobile *et al.* Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs	)	
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OPPOSITION TO PETITION FOR RECONSIDERATION

Nextel Communications, Inc. ("Nextel") opposes the petition for reconsideration filed by the Missouri Small Telephone Company Group ("MoSTCG") addressing certain aspects of the Federal Communications Commission's ("Commission") *Declaratory Ruling and Report and Order* ruling on the lawfulness of state filed wireless termination tariffs.[1] Among other things, the MoSTCG asks the Commission to add to its ruling by expressly allowing rural incumbent Local Exchange Carriers ("ILECs") to "opt-in" to existing reciprocal compensation or traffic termination agreements that wireless carriers may have with other rural ILECs in a particular state.[2] Because MoSTCG offers no serious legal or policy justification to make this substantial and unwarranted revision to the Commission's interconnection rules, the MoSTCG Petition should be denied.

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[1] *Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855 (2005) (*T-Mobile Order*); *appeal pending sub nom. Ronan Telephone Co v. FCC*, Case No. 05-71995 (9th Cir. 2005).

[2] *Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, CC Docket No. 01-92, Petition for Reconsideration of the Missouri Small Telephone Company Group (March 25, 2005) ("Petition").

I. INTRODUCTION

Nextel is a Commercial Mobile Radio Service ("CMRS") carrier with operations in markets nationwide. Nextel was concerned about the potential proliferation of unilaterally filed state tariffs that by their terms purported to assess payment obligations on CMRS carriers that terminate local traffic to the customers of rural ILECs because these types of tariffs undermine any incentive on the part of rural ILECs that file them to negotiate in good faith to replace them with interconnection agreements. Because of its concerns regarding the legal and policy implications of the practice of filing wireless termination tariffs, Nextel joined as a co-petitioner with T-Mobile and other CMRS carriers in the underlying Declaratory Ruling proceeding.

Nextel fully supports the Commission's action in the *T-Mobile Order*, on a going forward basis, to prohibit the filing or enforcement of wireless termination tariffs.[3] Nextel also opposes any reconsideration of the Commission's critical prohibition against the filing or enforcement of wireless termination tariffs going forward, including the adoption of additional rules that, without any foundation or notice and comment, improperly attempt to make CMRS carriers fully subject to the regulatory obligations and procedures Congress reserved in the Telecommunications Act of 1996 (the "1996 Act") solely for incumbent LECs.

II. THERE IS NO REASON TO "CLARIFY" THE T-MOBILE ORDER IN THE MANNER MoSTCG ADVOCATES.

The MoSTCG Petition asks the Commission to clarify or, more accurately, to modify substantially existing interconnection rules to provide rural ILECs with the ability to opt-in to state commission-approved agreements with wireless carriers within a particular state. The MoSTCG

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[3] Nextel disagrees, however, with other limited aspects of the Commission's order and has for that reason filed a Petition for Review that is now pending before the Ninth Circuit Court of Appeals. *Nextel Communications v. FCC*, Case No. 05-73556 (9th Cir. 2005).

proposes that the Commission adopt specific rule language that mirrors the revised opt-in rule applied to incumbent LECs pursuant to Section 251(c) of the Act.[4] In making this request, the MoSTCG makes the implicit and unwarranted assumption that the Commission intended in the *T-Mobile Order* to re-interpret radically the meaning and application of Sections 251 and 252 of the Act. This is a mischaracterization of the *T-Mobile Order*.

The *T-Mobile Order* provides no legal or policy justification for imposing onerous statutory obligations on CMRS carriers that were intended to apply only to incumbent LECs, the carriers with demonstrated market power in the local exchange market. Nor could the Commission even attempt such a fundamental reinterpretation of the Act without following the Administrative Procedure Act's requirement for notice and comment.[5] Taken to its logical conclusion, MoSTCG would have the Commission apply UNE pricing, wholesale/resale discounts and the full range of incumbent LEC obligations present in Sections 251(c) and 252 to CMRS carriers. This would be an absurd and unintended result of the *T-Mobile Order* and the Commission should take the opportunity to clarify the scope of its action – the Commission did not reinterpret the application of Sections 251 and 252 of the statute in the *T-Mobile Order*.

Fundamentally, reconsideration is appropriate only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or existing at the petitioner's last opportunity to present these issues.[6] A petition for reconsideration also must state

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[4] Petition at 4-5.

[5] *See* 5 U.S.C. § 553(b) (requiring general notice of a proposed rulemaking); 5 U.S.C. § 553(c) (requiring an opportunity for interested parties to comment).

[6] *See, e.g., American Distance Education Consortium Request for an Expedited Declaratory Ruling and Informal Complaint*, Memorandum Opinion and Order, 15 FCC Rcd 15448, ¶ 7 (2000); *Applications of Vodaphone Airtouch, PLC and Bell Atlantic Corporation, et al.*, Order on Further Reconsideration, 17 FCC Rcd 10998, ¶ 2 (2002); *LMDS Communications, Inc.*, Order on

with particularity how the Commission should change its prior decision.[7] None of the issues raised by the MoSTCG Petition meet these requirements and the Commission should deny the Petition.

A. MoSTCG Mischaracterizes the Commission's Action.

As a general matter, the MoSTCG asserts that the Commission intended literally to apply Sections 251(c) and 252 of the Act to CMRS carriers. The MoSTCG Petition states:

> The Order explains that the Act requires LECs to enter into agreements, but the Act does not explicitly impose the same reciprocal compensation obligations on CMRS providers...Therefore, the FCC found it was necessary to ensure that LECs have the ability to compel negotiation and arbitration with CMRS providers, and the FCC clarified that incumbent LECs 'may request interconnection from a CMRS provider and invoke the negotiation and arbitration provisions of § 252 of the Act.'[8]

This statement, however, misreads the scope and intent of the Commission's action in the *T-Mobile Order*. The Commission did not intend a fundamental reinterpretation of the Act to apply the same interconnection obligations on CMRS carriers as those required by statute to be applied to incumbent LECs. Such an action would constitute a remarkable regulatory over-reaction based neither on federal law nor basic market conditions.[9] The Commission amended its rules to address

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Reconsideration, 15 FCC Rcd 23747, ¶ 6 (2000); *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992*, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 19 FCC Rcd 5854, ¶ 6 (2004); *Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, Order on Reconsideration, 16 FCC Rcd 5022, ¶ 18 (2001).

[7] 47 C.F.R. §§ 1.106(d)(1), 1.429(c).

[8] Petition at 2.

[9] Section 251 and 252 interconnection and pricing obligations are classified according to statutory definitions for particular classes of carriers. CMRS carriers are telecommunications carriers and only Section 251(a) describes the CMRS carrier interconnection obligation. Local Exchange Carriers are subject to Section 251(a) and (b), and only incumbent LECs shoulder the specific, additional obligations of Section 251(c) and 252. The reason for this disparity in regulatory obligation in connection with interconnection is simple: Congress was legislating to open the local

the concern repeatedly raised by MoSTCG and other rural ILEC groups in the underlying proceeding that "in the absence of an agreement or other arrangement wireless termination tariffs are the only mechanism by which they can obtain compensation for terminating this traffic."[10] The Commission came to this conclusion only "[i]n light of our decision to prohibit the use of tariffs to impose termination charges on non-access traffic."[11] Thus, the Commission determined it would, by rule, allow rural ILECs to seek interconnection from CMRS carriers so that the issue of which carrier could initiate the interconnection process for the payment of reciprocal compensation could be laid to rest. By its Petition, MoSTCG is seeking an unwarranted, whole cloth application of the Commission's Section 251 and 252 ILEC interconnection rules to CMRS carriers, regardless of the obvious differences in their circumstances and the plain distinctions Congress made in setting statutory classifications and resulting interconnection obligations.

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exchange market to competition, and the interconnection obligations contained in the statute are calibrated to counteract the market power ILECs indisputably possessed in these markets. This is also true in rural markets, although Congress did adopt a limited rural exemption in Section 251(f). This rural exemption, to the extent it is maintained by state commissions, does not excuse rural ILECs from the duty to establish reciprocal compensation arrangements for the transport and termination of traffic under Section 251(b).

[10] *T-Mobile Order* at ¶ 8. In taking this action, the Commission relied in part upon assertions made by MoSTCG. *See, e.g., Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, The Missouri Small Telephone Company Group's Comments Regarding CMRS Petitioners' Petition for Declaratory Ruling at 4 (Oct. 18, 2002) ("[wireless termination tariffs] are necessary in order to ensure that Missouri's small ILECs are compensated for the use of their facilities"); *id.* at 7 ("wireless carriers could simply send traffic to small rural exchanges without paying anything for the use of the small ILECs' facilities and services"); *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, The Missouri Small Telephone Company Group's Reply Comments at 5 (Nov. 1, 2002) ("Thus, the MoSTCG wireless tariffs were necessary in order for the MoSTCG companies to receive compensation for the wireless carriers' use of the MoSTCG companies' facilities and services."); *id.* at 13 ("[without wireless termination tariffs], the CMRS Petitioners will pay nothing for their use of the small companies' facilities and services.") Even after receiving the relief it sought, MoSTCG has petitioned the Commission for further relief.

[11] *T-Mobile Order* at ¶ 16.

B. MoSTCG Offers No Legal or Policy Justification for Allowing Rural ILECs to Opt-In to Existing Agreements.

MoSTCG suggests that there is some regulatory parity justification for the opt-in rule it seeks. For example, the Petition contends that allowing rural ILECs to opt-in to approved agreements will "provide the small rural ILECs with the same procedures under the Act that are available to CMRS carriers."[12] Such parity, however, is not required by the Act or by the terms of the *T-Mobile Order* and would not be in the public interest.

Indeed, the sudden interest expressed by MoSTCG in "me-too" interconnection arrangements is surprising, given the rural ILECs' insistence on their uniqueness in a variety of forums. For example, in arguing against the use of forward-looking economic cost models as a basis for a rural universal service support mechanism, rural ILECs went to great lengths to stress the unique characteristics of rural markets, not only as distinct from non-rural markets, but also as distinct from one another.[13] Rural ILECs similarly have not endorsed *en masse* a particular intercarrier compensation reform plan due to the "significant differences in the situations facing individual rural ILECs."[14] Rural ILECs should not be heard to demand individualized treatment because of their alleged unique circumstances in one aspect of intercarrier compensation while also

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[12] Petition at 3.

[13] *See, e.g.*, *Federal State Joint Board on Universal Service*, CC Docket No. 96-45, Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies at 10 (Oct. 15, 2004) (advocating against the adoption of forward-looking economic cost models as a basis for rural support because such models fail to account for the "substantial diversity" among rural carriers); *Federal State Joint Board on Universal Service*, CC Docket No. 96-45, Comments of the Independent Telephone and Telecommunications Alliance at 24 (Oct. 15, 2004) ("rural carriers face diverse circumstances and 'one size does not fit all'"...).

[14] *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Comments of National Telecommunications Cooperative Association at 3 (May 23, 2005).

demanding the right to opt-in to contractual arrangements negotiated between other parties in another. Such policies would create a "heads I win, tails you lose" situation.

Assuming the "wide variability [that] exists *among* rural markets,"[15] allowing a rural ILEC to opt-in to an arrangement negotiated with a CMRS carrier anywhere else in the state seems particularly inappropriate. The traffic volume and other circumstances can vary from one market to another within the same state, often dictating whether direct or indirect interconnection may be economically viable. Applying an opt-in requirement to CMRS agreements fails to account for these variables.

In fact, extension of an opt-in obligation to CMRS carriers could be harmful in the situation where a CMRS carrier may have conceded on a number of issues in negotiation with a single rural ILEC rather than taking the expensive and unpredictable path of arbitration, never anticipating that these same concessions could be broadly extended to all ILECs in a state, regardless of traffic volumes exchanged and other network facility and other variables. There simply is no policy justification for extending an opt-in obligation to CMRS carriers.

C. Purported Uncertainty Regarding the Commission's Interim Pricing Rules Does Not Support the Opt-In Relief Advocated by MoSTCG.

In making its argument in favor of imposing an opt-in rule on CMRS carriers, MoSTCG observes that the Commission's interim pricing provisions at 47 C.F.R. § 51.715 refer to default proxies at 47 C.F.R. § 51.707 which were vacated by the Eighth Circuit.[16] MoSTCG argues that this "uncertainty about what interim rates apply...makes it especially appropriate to grant rural

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[15] *Federal State Joint Board on Universal Service*, CC Docket No. 96-45, Comments of the Independent Telephone and Telecommunications Alliance at 4 (Oct. 15, 2004) (emphasis in original).

[16] *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff'd in part and rev'd in part sub nom. Verizon Commc'ns. v. FCC*, 535 U.S. 467 (2002).

ILECs the ability to opt in to approved agreements that CMRS providers have with other small rural ILECs as this will minimize (or eliminate) the need for negotiations and interim compensation mechanisms."[17]

It is unnecessary for the Commission to adopt an opt-in obligation that the Act reserves solely for ILECs on CMRS carriers for the purpose of minimizing uncertainty over the applicable reciprocal compensation rate. The Commission appears to have already addressed any potential harm caused by uncertainty over what interim rates should apply pending negotiations due to its determination to apply the interim pricing provisions of 47 C.F.R. § 51.715, which include a true-up rule.[18] If this provision is read to require true-up following the approval of a negotiated interconnection agreement, any concern over the "uncertainty" surrounding interim rates should be minimized. A true-up would also minimize the prospect of economic harm for the rural ILECs.

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[17] Petition at 4. This argument of course overlooks the point that states by and large have conducted "cost" studies and established rates, thus making any application of the Commission's interim proxy pricing rules highly unlikely.

[18] *T-Mobile Order* at ¶ 16, establishing interim compensation requirements consistent with 47 C.F.R. § 51.715. Pursuant to 47 C.F.R. § 51.715(d), if the rates in an interim arrangement differ from the rates established by a state commission, the state commission must require carriers to make adjustments to past compensation to allow each carrier to receive the level of compensation it would have received had the rates in the interim arrangement equaled the rates eventually established. In the context of a LEC requesting interconnection with a CMRS carrier, this provision could be reasonably read to require a Section 51.715 true-up following state commission approval of a negotiated agreement or arbitration.

III. CONCLUSION

The MoSTCG Petition fails to meet the standard for reconsideration, and indeed sets forth no serious legal or policy justification for the clarifications and wholesale substantive revisions to the Commission's interconnection rules that MoSTCG seeks without the benefit of a notice and comment rulemaking. This transparent attempt to obtain a result not contemplated by the Commission rules is unwarranted and goes far beyond what the Commission intended to accomplish in adopting a rule to address the purported inability of rural ILECs to obtain reciprocal compensation from CMRS carriers. The Commission's determinations in the *T-Mobile Order* provide no vehicle to increase the regulatory burdens associated with interconnection on wireless carriers, nor would additional rules imposed on CMRS carriers be consistent with market reality or be in the public interest. The Commission should therefore deny the MoSTCG Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Carole A. Rehm, a legal secretary at Drinker Biddle & Reath LLP, do hereby certify that on this 30th day of June, 2005, a copy of the foregoing "**OPPOSITION TO PETITION FOR RECONSIDERATION**" was mailed to the following:

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